IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 4085 of 1983

For Approval and Signature:

Hon'ble MR.JUSTICE S.K.KESHOTE

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1. Whether Reporters of Local Papers may be allowed to see the judgements?

2. To be referred to the Reporter or not?

3. Whether Their Lordships wish to see the fair copy of the judgement?

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?

5. Whether it is to be circulated to the Civil Judge?

HARISHCHANDRA B SAIJA

Versus

STATE OF GUJARAT & ANR.

Appearance:

MR NV SOLANKI for Petitioner

MR NIGAM SHUKLA for Respondent

CORAM : MR.JUSTICE S.K.KESHOTE

Date of decision:16/10/96

C.A.V. JUDGMENT

Heard learned counsel for the parties.

2. The petitioner, in this Special Civil Application, challenged the order dated 18.6.83 made by respondent No.2, the Controller of Weights and Measures, Government of Gujarat, Ahmedabad, under which he was discharged from the services.

3. The petitioner was selected on the post of Junior Inspector of Weights and Measures in the office of respondent No.2 vide order dated 29.8.81 on probation for a period of three years from the date of joining the department. The petitioner joined the services on 14.9.81. Under the impugned order, the petitioner was discharged from services on the ground of unsatisfactory work during probation period.

4. The respondents filed reply to this writ petition and contended therein that the petitioner was appointed on probation and as his work was not satisfactory, under the order dated 18.6.83, he was discharged from services. It is a simpliciter discharge from services which does not case any stigma and as such it was not obligatory on respondent No.2 to give any notice or opportunity of hearing to the petitioner before making the said order. Regarding unsatisfactory work of the petitioner, the respondent No.2 has given instances.

5. The learned counsel for the petitioner contended that the order dated 18.6.83 is punitive and as such, it could have been made only after following the principles of natural justice which has not been followed in the present case. It has next been contended by the learned counsel for the petitioner that the order dated 18.6.83 is stigmatic and the provisions of Article 311 of the Constitution of India are to be followed before dispensing with his services. Lastly, he urged that the instances of unsatisfactory work which have been given by the respondent in reply are foundation of the order and not merely motive. It is the order which has been made by way of penalty and in the garb of giving penalty to the petitioner for alleged misconduct, his services were dispensed with under simpliciter discharge order. In support of his contention, the learned counsel for the petitioner placed reliance on the decisions of Supreme Court and this Court in the following cases:

1. AIR 1984 SC 636
2. AIR 1986 SC 1626
3. 1987 (4) SLR 576 (SC)
4. AIR 1991 SC 1490
5. 1991(2) GLR 1370 (correct page 1307)
6. 1994(4) SLR 157 (GUJ)

6. On the other hand, the learned counsel for the respondents contended that it is a simpliciter discharge of probationer without any stigma, and as such, provisions of Article 311 of the Constitution of India are not attracted in the present case. The instances of unsatisfactory work of the petitioner were given to show

and establish before this Court that his services have rightly been dispensed with. Those instances were not foundation for the order but were only motives and as such, the order does not suffer from any infirmity whatsoever. Whatever material was there against the petitioner to form the opinion to terminate his services by the authority has been disclosed before this Court. That has been disclosed for the reason to show the bonafides of the respondent. The order of termination of services of the petitioner is not by way of penalty as contended by the learned counsel for the petitioner and as such, this writ petition deserves to be dismissed.

7. I have given my thoughtful considerations to the submissions made by the learned counsel for the parties.

8. It is no more res-integra that if the order of discharge of a probationer from services casts stigma on the Government servant in the sense that it contains a statement casting aspersion on his his conduct or character, then the Court will treat the order as an order of punishment, attracting the provisions of Article 311 (2) of the Constitution of India. It is also a settled law that form of order is not conclusive. Even if the order is innocuously worded then too in appropriate case the Court can lift veil and see whether it is a case of termination by way of penalty or a simpliciter termination. In the present case, in the reply, the respondents have given instances on the basis of which the services of petitioner were considered to be unsatisfactory. The learned counsel for the petitioner, on the basis of that material, contended that it is a case where the petitioner was punished for his alleged default in performance of duties or erring in discharge of duties or in not complying with the directions given by the superior officer. The Apex Court in the case of State of Orissa v. Ram Narayan Das, reported in AIR 1961 SC 177, has held that in the case of a probationer, observations like unsatisfactory work and conduct would not amount to attaching stigma to the order. The learned counsel for the petitioner does not dispute that the power vests with the respondent to discharge a probationer in case his work is found unsatisfactory during the period of probation. The learned counsel for the petitioner also admits that the impugned order annexure `A', there is not any specific mention which casts any stigma. The order of termination has been made on the ground that the services of the petitioner are no more required. The learned counsel for the petitioner contended that though the order is innocuously worded but the petitioner has been punished for the alleged conduct

as referred in the reply and as such it is by way of penalty. In view of this contention, it is not necessary go on the question that whether the order is stigmatic or not and the consideration is only confined to this contention of the learned counsel for the petitioner. Otherwise in the case of Union of India v. R.S. Dhaba reported in (1969) 3 SCC 603 and in the case of Hari Singh Mann v. State of Punjab reported in (1975) 3 SCC 182, observed that "... having been found unsuitable after trial to hold the post of Income Tax Officer, Class II is hereby reverted..." and "The President of India is pleased to dispense with the service of having considered him unfit for appointment to the State Police Service..." in both these cases the orders were not accepted to be stigmatic by the Supreme Court. In the case of Ram Narayan Das (supra), a probationer was discharged from services for unsatisfactory work and conduct. The High Court found the order to be stigmatic, but the Supreme Court has reversed the decision and the same was not considered to be stigmatic order.

9. The instances which have been given in the reply regarding unsatisfactory work of the petitioner may be a motive and not the foundation of the order. In the case of a probationer, his work has to be assessed for confirmation or continuation in services and when this assessment has been made, short coming in his work or some other conduct has to be noticed, the crux of this discussion is that merely on the basis of these things, it cannot be said that the termination has been made by way of penalty. The substance has to be considered and in case the Court finds that the alleged short coming in the work of a probationer or other conduct is the foundation of the order and not the motive then certainly it may amount to penalty, but not otherwise. The petitioner has challenged the order of termination of services and naturally to defend the action, the respondent has to give out material on the basis of which he was considered to be unfit for the job. But on this material it cannot be said that the petitioner was punished by way of penalty. Normally, in case of termination of services of a probationer, no reasons have to be given in the order and all care should be taken that the order should be as innocuous as it can be so that the employee may not carry any stigma. The termination of services of a probationer is not disqualification for future appointment and that is the reason that note of caution has to be taken that the order is not stigmatic, otherwise it may give some difficulty to the person to get employment in future. This Court can go behind the order by lifting the veil to

see whether the the termination is by way of penalty or simpliciter termination. But at the same time, while going on this question, this Court will not go to the extent of taking every material which has been produced against the petitioner to be a misconduct or to be a misconduct on which inquiry should have been held. The totality of the facts has to be considered and in case the Court is satisfied that all the material produced were only motive for passing of the order and not the foundation, this Court should decline to interfere in the matter. Though the petitioner has enlarged the pleadings to the extent more than what was necessary as on every material, the petitioner has raised voice that it was thing on which inquiry could have been held. In the reply, instances have been given where the petitioner has not satisfactorily discharged his duties. The petitioner was entrusted with the work of Inspector of Weights and Measures which is an important work and in case he has not properly discharged his duties and short coming were noticed therein, then the respondent has rightly reached to the conclusion that he should not be continued in the services. This material has been considered to assess the suitability of the petitioner for the job. The intention of the respondent was not to penalize the petitioner. He has been given sufficient opportunity to improve his work but the petitioner has not made use of that opportunity. The short coming in his work were persisted and ultimately the authority has taken a decision to dispense with his services. The petitioner is an effected person and he can say anything. There is no malafides alleged against the authority who made the order. Normally, when no malice has been pleaded than whatever action is taken by the respondent, should be taken to be fair and reasonable and the instances which have been cited for reaching to conclusion are the only motives and not the foundation.

10. A reference may have to the latest two decisions of Supreme Court in the case of K.V. Krishnamani v. Lalit Kala Academy, reported in (1996)5 SCC 89, and in the case of Hukam Chand Khundia v. Chandigarh Administration & Anr., reported in (1995)6 SCC 534 which are directly on the question of termination of services of a probationer. In the case of K.V. Krishnamani v. Lalit Kala Academy (supra), the appellant therein was appointed initially on adhoc basis on 3.3.87 and thereafter with a view to regularise his service, he was put on probation. During probation, his services having been found to be not satisfactory, were terminated by proceedings dated 1.12.89. That order has been challenged by the appellant therein by filing writ

petition in the High Court which has been dismissed. Then he approached the Apex Court by way of Civil Appeal. In that case before the Supreme Court, the contention was made that since the averments made in the counter would constitute foundation for dismissal for misconduct, an enquiry in this behalf was required to be made. On the other hand, the respondent has contended that during the probation the appellant did not acquire any right to the post. If on being found suitable he was regularised, only then he would have acquired the right to continue in the post. During probation it was found that his services were not satisfactory and the reasons were given in support thereof. They do not constitute foundation but motive to terminate the services. In the aforesaid facts and contentions, the Apex Court has held in para-4 of the said judgment as under:

..."We find force in the contention of the respondent. They have explained that the driving of the staff car was not satisfactory and that, therefore, they have terminated the services of the appellant during probation. The very object of the probation is to test the suitability and if the appointing authority finds that the candidate is not suitable, it certainly has power to terminate the services of the employee. Under these circumstances, it cannot but be held that the reasons mentioned constitute motive and not foundation for termination of service. Therefore, we hold that the High Court has not committed any error of law."

In the present case, exactly the counsel for the petitioner contended that the averments made in the counter (reply to Special Civil Application) would constitute foundation for dismissal for misconduct and as such, inquiry in this respect was required to be made. But as stated earlier, the respondents in the reply to Special Civil Application, have given reasons in support that the services of the petitioner were not satisfactory. These reasons given do not constitute foundation but motive to terminate the services of the petitioner. In the case of Hukam Chand Khundia v. Chandigarh Administration & Anr. (supra), the Apex Court has held that where the services of an employee were found to be unsatisfactory for the reasons indicated, the termination of services of such an employee under the order of termination simpliciter without attaching any stigma against him is not arbitrary or capricious. In the present case, the services of the petitioner were found unsatisfactory for the reasons specifically stated by the respondents in the reply to the Special Civil Application. As his services were found unsatisfactory

the termination order cannot be held arbitrary and capricious in the facts which have come on record. I do not think that in reality, an order of punishment has been passed against the petitioner by the respondent in cloak or pretence of termination simpliciter without holding any departmental proceedings, thereby violating Article 311 of the Constitution.

11. A reference may have to the decision of this Court in the case of Prasant Manvant Rai Shah v. The State of Gujarat, reported in 1995(1) GLR 780. That was also a case of termination of services of a probationer made stating in the order that his services are not required and no allegations whatsoever have been made and the same was considered to be a simpliciter termination. In the case of Anoop Jaiswal v. Government of India & Anr., reported in AIR 1984 SC 636, the Supreme Court has held that the form of the order is not decisive as to whether the order is by way of punishment and that even innocuously worded order terminating the service may in the fact and circumstances of the case establish that an enquiry into allegation of serious and grave character of misconduct involving stigma has been made in infraction of the provision of Art.311(2) of the Constitution . The Court has further held that where form of the order is merely a camouflage for an order of dismissal for misconduct it is always open to the Court before which the order is challenged to go behind the form and ascertain the true character of the order. There is no quarrel with the ratio as laid down by the Supreme Court in the aforesaid case.

12. The learned counsel for the petitioner then cited decision of this Court reported 1984 GLH 136, but I do not find any such decision on that page.

13. In the case of Jarnail Singh and Ors. v. State of Punjab, reported in AIR 1986 SC 1626, the Supreme Court has held that mere form of the order is not sufficient to hold that the order of termination was innocuous and the order of termination of service of a probationer or of an adhoc appointee is a termination simpliciter in accordance with the terms of appointment without attaching any stigma to the employee concerned. The Supreme Court has held that the substance of the order, i.e.the attending circumstance as well as the basis of the order has to be taken into consideration. In that case the service of an adhoc employee came to be terminated on the basis of adverse remarks and allegation of embezzlement. In these facts, the Supreme Court has stated that the order of termination by way of punishment

was illegal for non compliance of Art.311 of the Constitution. This case is of no help to the petitioner in the present case. As stated earlier, the termination of services of the petitioner has not been made for misconduct.

14. The next case has been cited by the learned counsel for the petitioner is reported in 1991(2) GLR 1370, but I do not find any decision on this page on the subject in issue. However, there is a decision at page 1307 in the case of Dilipsinhji D. Rathod v. Vijaysinh Parmar. This Court, in this case, has held that where a probationer's service are terminated, the Court may, in an appropriate case, lift the veil and ascertain the reasons underlying the order and if the order is found punitive in nature and passed without inquiry, the same is liable to be set aside. Here again, so far as the principles as laid down in this case are concerned, there may not be any dispute, but in the present case, the termination of service of petitioner was not by way of penalty. Whatever material on the basis of which the opinion was formed that his services are not required, have been disclosed and as held earlier, that was only motive and not foundation. In the case which was for consideration before this Court there were very serious charges and in that background it was considered to be a case of penalty. In the case of Om Prakash Goel v. The Himachal Pradesh Tourism Development Corporation Ltd., Shimla & Anr., reported in AIR 1991 SC 1490 the matter was about Industrial Disputes Act. That was a case of termination of services but not of the probationer. In that case, chargesheet has been given to the petitioner therein and inquiry has also been concluded, but without reference to the chargesheet, simpliciter termination has been ordered. In those facts, the Supreme Court has held that the form of termination order was merely clog for order of punishment. On this ground, the order of termination was set aside, but that case is also of little help to the petitioner because the petitioner herein was appointed on probation and it is case of simpliciter termination.

15. In the case of Hardip Singh v. State of Haryana reported in 1987(4) SLR 576, the termination of services of the probationer on the ground of taking part in non food campaign, was held to be not a simpliciter termination but a termination by way of punishment. In that case, on the basis of material which has come up on record, it has been held that it was not a case of simpliciter termination of probationer, but it was an order of removal or dismissal of the employee from

services and in fact the order made by way of punishment after considering service conduct of the petitioner. On the facts of that case, the matter has been considered and it was held to be a case of removal or dismissal, which is not again the case here. I have already held earlier that it is a case of simpliciter termination of the services of a probationer. So far as the decision of this Court in the case of Gram Panchayat v. Sharadkumar D. Acharya, reported in 1994(4) SLR 157 is concerned, it is suffice to say that it was a case of termination of the services of a probationer who was a workman and this Court has held that it is a case of retrenchment and as such, the provisions of Section 25F of the Industrial Disputes Act have to be complied with. This case is also of little help to the petitioner because the petitioner is not a workman nor respondent is an industry in the present case.

16. In the result, this writ petition fails and the same is dismissed. Rule is discharged. No order as to costs.

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(sunil)